

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:2:TL-N-2085-01
JWFogelson

date:

to: Michael R. Friedman, Territory Manager
Territory 1110, Group 1117
Attention: Elaine Ingram, Revenue Agent

from: Area Counsel (Financial Services)

subject:

██████████ (now named ██████████
██████████) and Affiliated Corporations
Execution of Form 872
Tax Years Ending ██████████

Statute of Limitations on Assessment: ██████████ (per prior
extension)

U.I.L. Nos. 6501.08-00, 6501.08-09, 6501.08-17

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum is not binding on Examination or Appeals and is not a final case determination. This memorandum is advisory and does not resolve Service position of an issue or provide the basis for closing a case. The determination of the Service in this case is to be through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum is in response to your request for assistance dated March 29, 2001 in the above-captioned matter concerning a consent to extend the statute of limitations on assessment of income taxes for the tax year ending ██████████ of ██████████ (hereinafter "██████") and its affiliated companies. As is discussed further below, on ██████████, (i) ██████████ was acquired by ██████████ (hereinafter "██████"), and (ii) ██████████ changed its name to ██████████

(hereinafter "[REDACTED]"). This memorandum should not be cited as precedent.

ISSUES

1. Who is authorized to execute a consent extending the statute of limitations on assessment of income taxes (Form 872) for [REDACTED] and its affiliated companies for their tax years ending [REDACTED]?

2. What language should be used in this Form 872?

CONCLUSIONS

1. Based on the taxpayer's representations (i) that [REDACTED]'s acquisition of [REDACTED] and its affiliated companies on [REDACTED], was not a "reverse" acquisition as defined in Treas. Reg. § 1.1502-75(d) (which representation is consistent with representations set forth in various Securities and Exchange Commission filings of [REDACTED] and [REDACTED]), and (ii) that [REDACTED]'s corporate existence continues to date (albeit under the name [REDACTED]), [REDACTED] is authorized to execute a Form 872 extending the statute of limitations on assessment of income taxes for [REDACTED] (i.e., itself) and its affiliated companies for their tax years ending [REDACTED].

2. Set forth below on pages 6 and 7 is suggested language to be included in the consent to be executed by [REDACTED] for itself and its affiliated companies for their tax years ending [REDACTED].

FACTS

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modification to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately ten days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

[REDACTED] (E.I.N. [REDACTED]) was formed under the laws of Delaware. [REDACTED] filed a consolidated income tax return on behalf of itself and its affiliated corporations (hereinafter the "[REDACTED]") for the [REDACTED]'s "consolidated return year," as defined in Treas. Reg. § 1.1502-1(d), ending [REDACTED]. During this consolidated return year, [REDACTED] was the "common parent," within the meaning of

I.R.C. § 1504(a) and Treas. Reg. §§ 1.1502-1(b) and (c), of the [REDACTED]. [REDACTED] has previously executed a Form 872 extending through [REDACTED] the statute of limitations on assessment of income taxes for all members of the [REDACTED] for their tax years ending [REDACTED].

[REDACTED]'s acquisition of [REDACTED] and its affiliated companies took place on [REDACTED]. On that date, [REDACTED] was acquired by [REDACTED] in a reverse triangular merger described in I.R.C. §§ 368(a)(1) and 368(a)(2)(E). In this transaction, (i) a subsidiary of [REDACTED], newly formed under the laws of Delaware, exchanged shares of [REDACTED] for shares of [REDACTED], and (ii) the newly formed subsidiary then merged into [REDACTED]. As a result, [REDACTED] became a subsidiary of [REDACTED] and the other members of the [REDACTED] became lower-tier subsidiaries of [REDACTED]. Immediately after its acquisition by [REDACTED], [REDACTED] changed its name to [REDACTED]. [REDACTED] uses the same E.I.N. as was used by [REDACTED].

[REDACTED] has advised the Service (i) that [REDACTED]'s acquisition of [REDACTED] in the reverse triangular merger described above was not a reverse acquisition as defined in Treas. Reg. § 1.1502-75(d) because [REDACTED]'s former shareholders did not receive, as a result of [REDACTED]'s acquisition of shares of [REDACTED], more than [REDACTED]% of the [REDACTED] shares outstanding immediately after the reverse triangular merger, and (ii) that the separate corporate existence of [REDACTED] continues through today, albeit under the name [REDACTED].

For purposes of this memorandum, we have relied on the representations described in the immediately preceding paragraph. Based on these representations, consistent with Treas. Regs. §§ 1.1502-75(d) and 1.1502-76(b)(ii), the existence of the [REDACTED] terminated on [REDACTED] when its members became members of the [REDACTED].

DISCUSSION

1. Who is authorized to execute a Form 872 for [REDACTED] and the other members of the former [REDACTED] for their tax years ending [REDACTED]?

I.R.C. § 6501(a) provides generally that the amount of any tax shall be assessed within three years after the relevant tax return was filed. Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the previously existing period, i.e., either the original statutory period set forth in I.R.C. § 6501(a) or an extended period established in a prior written extension agreement between the parties. A Form 872, Consent to Extend the Time to Assess Tax, is used to so extend the limitations period.

Pursuant to Treas. Reg. § 1.1502-77(a), the common parent of a group of affiliated corporations filing a consolidated income tax return for a particular consolidated return year is the sole agent for each member of the group and, as such, is authorized to act in its own name in all matters relating to each group member's income tax liability for its tax year included in that consolidated income tax return. Pursuant to Treas. Reg. § 1.1502-77(c), unless there is an agreement to the contrary, a Form 872 entered into by a group's common parent for a particular consolidated return year will apply to extend the period of limitations on assessment of income tax for the tax year of each group member included in that consolidated return.

Further, under Treas. Reg. § 1.1502-77(a), a consolidated group's common parent for a particular consolidated return year remains the sole agent for the other members of the group for such year so long as the common parent continues its corporate existence, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985).

In this case, because [REDACTED]'s corporate existence continues, [REDACTED] remains the agent for the other members of the [REDACTED] that joined in the consolidated income tax return filed by [REDACTED] for the consolidated return year ending [REDACTED].¹

¹ That [REDACTED]'s corporate existence continued after its acquisition by [REDACTED] can be seen from applicable state law. With respect to a merger of two or more Delaware corporations, § 251(a) of the General Corporation Law of the State of Delaware provides, in part, that:

Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations ... pursuant to an agreement of merger ... complying and approved [by the corporations and their shareholders] in accordance with this section. Del. Code Ann., tit. 8, § 251(a) (2000).

Also with respect to such a merger, General Corporation Law § 259(a) provides, in part, that:

When any merger ... shall have become effective under this chapter, for all purposes of the laws of this State the

Because [REDACTED] still exists, under Treas. Reg. §1.1502-77(a), [REDACTED] is the proper entity to execute a Form 872 on behalf of itself and each member of the [REDACTED] for each consolidated return year of the [REDACTED] during which [REDACTED] was the group's common parent. Thus, [REDACTED] is authorized to execute a Form 872 extending the statute of limitations on assessment of income taxes for each member of the [REDACTED] for the group's tax years ending [REDACTED].

Neither I.R.C. § 6501(c)(4) nor the regulations thereunder specify who may sign consents. The Service therefore applies the rules applicable to the execution of the original returns to the execution of Forms 872. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

I.R.C. § 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. I.R.C. § 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the corporation. Accordingly, any such corporate officer may sign a Form 872, whether or not that individual signed the related corporate income tax return. Rev. Rul. 84-165, 1984-2 C.B. 305.

Based upon the above, a Form 872 extending the assessment limitations period for the tax year ending [REDACTED] of each member of the [REDACTED] should be executed by an authorized officer of [REDACTED].

2. What language should be used in this Form 872?

We suggest that the following language be used in a Form 872

separate existence of all the constituent corporations ... except the one into which the other or others of such constituent corporations have been merged ... shall cease and the constituent corporations shall ... be merged into 1 of such corporations, ... and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving ... corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. Del. Code Ann., tit. 8, § 259 (2000). (Emphasis added.)

to extend the [REDACTED]'s tax years ending [REDACTED]:

[REDACTED] (EIN: [REDACTED]), formerly [REDACTED], and affiliated corporations*

Further, we suggest the following language for the footnote:

* - With respect to the consolidated liabilities of [REDACTED], formerly [REDACTED], and affiliated corporations for taxable years ending [REDACTED].

In addition, you should consider adding to the Form 872 to be executed by [REDACTED] the language regarding TEFRA partnerships set forth in Form 872-I. If you believe it advisable, this language could be added after paragraph 2 of the Form 872. This language would extend the statutes of limitations on assessment and for filing a timely administrative adjustment request with respect to any TEFRA partnership of which a [REDACTED] member was a partner during the member's tax year ending [REDACTED], provided these TEFRA statutes of limitations are still open at the time the Form 872 is entered into by [REDACTED] and the Service. The language set forth in Form 872-I is as follows:

Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b) but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership

shall not terminate this agreement for items attributable to a partnership.

Finally, the Form 872 should be signed in the name of [REDACTED] by an authorized officer thereof.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the consent. Alternatively, you may advise the taxpayer in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective statute of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case. If

you have any questions concerning this memorandum, please contact Joseph W. Fogelson at (212) 264-1595, ext. 224.

ROLAND BARRAL
Area Counsel
(Area 1:Financial Services)

By: _____
JOSEPH W. FOGELSON
Senior Attorney